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No. 76-755

In the Supreme Court of the United States

OCTOBER TERM, 1976

J. RICHARD DEMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
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Petitioner challenges the correctness of the decision of the court of appeals reversing the district court's injunctive order against the Internal Revenue Service restraining it from seeking books or records from petitioner, his wife, or a corporation wholly owned by him.

The pertinent facts are as follows: In June, 1974, the government commenced an action in the United States District Court for the Northern District of Illinois, seeking to enforce three Internal Revenue Service summonses issued to petitioner, his wife, and Tabcor, Inc., petitioner's wholly owned corporation. These summonses sought information for ascertaining the correct income tax liabilities of petitioner and his wife for 1971 and 1972, and the employment tax liabilities of Tabcor, Inc., for the period 1971 to 1973 (Pet. App. A 2).

Petitioner refused to comply with the summonses and asked that they be quashed, alleging harassment by the Internal Revenue Service. During the enforcement action, the district court permitted petitioner to inspect certain records of the Internal Revenue Service (transcript of hearing on September 19, 1974, p. 9), to depose an Internal Revenue Service officer (transcript of hearing on October 22, 1974, p. 6), and to require the testimony of a revenue agent (transcript of hearing on February 7, 1975, p. 38), in an attempt to substantiate his claim of harassment. The district court ordered petitioner to produce certain corporate records for 1972 and 1973.[1] After petitioner complied with this order, the court thereupon dismissed the enforcement action without prejudice (Pet. App. A 2).

On the same day that the court dismissed the action to enforce the summonses (April 8, 1975), the Commissioner of Internal Revenue sent petitioner a notice of deficiency with respect to his 1971 income tax liability.[2] Petitioner thereupon filed a motion in the district court, ostensibly as part of the original summons enforcement action, seeking an order directing (1) that the revenue agent and his supervisor show cause why they should not be held in contempt for violating the court's previous order quashing the summons respecting personal records; and (2) the withdrawal of the notice of deficiency. After stating that the Internal Revenue Service's action "borders on harassment," the district court permanently restrained the Internal Revenue Service from issuing

[1]The district court did not order petitioner to produce his personal records after the government advised that it no longer required the records (Pet. App. A 2).

[2]Pursuant to 26 U.S.C. 6501(a), the statute of limitations would have otherwise expired on April 15, 1975.

any summons to, or requesting any books or records from petitioner, his wife or Tabcor for 1972 and prior years, and also suppressed any existing summons or requests for those years (Pet. App. A 2-3).

The court of appeals reversed. It held that the Anti-Injunction Act, 26 U.S.C. 7421(a), barred the district court from enjoining the Internal Revenue Service from seeking further production of records from petitioner in his pending Tax Court action or in other tax litigation.

1. The court of appeals correctly set aside the district court's order broadly enjoining the Internal Revenue Service from summoning or seeking books and records from petitioner, his wife, or his corporation. Such an expansive order would have directly interfered with the pending Tax Court litigation of petitioner's 1971 tax liability (*Dema* v. *Commissioner*, Dkt. No. 6234-75), and also with a district court refund suit involving the 1970 employment tax liability of his corporation (*Tabcor Sales Clearing, Inc.* v. *United States* (N.D. Ill., No. 75 C 2401)). The district court's restraining order is premature and is not a permissible substitute for the ordinary defenses available to petitioner in each discovery or summons enforcement proceeding. Cf. *G. M. Leasing Corp.* v. *United States*, No. 75-235, decided January 12, 1977, slip op. 20; *Meister* v. *United States*, 397 F. 2d 268, 269 (C.A. 3); *Hill* v. *United States*, 346 F. 2d 175, 178 (C.A. 9), certiorari denied, 382 U.S. 956.

2. The court of appeals also correctly held that the district court's prohibition against further discovery was barred by the Anti-Injunction Act, 26 U.S.C. 7421(a). The courts have recognized that the statute prohibits, in advance of tax litigation on the merits, injunctive orders which would prevent the Internal Revenue Service from obtaining access to a taxpayer's records, or from otherwise investigating his liabilities. See, *e.g.*, *Koin* v. *Coyle*,

402 F. 2d 468 (C.A. 7); *Lewis* v. *Sandler*, 498 F. 2d 395, 399 (C.A. 4); *Campbell* v. *Guetersloh*, 287 F. 2d 878 (C.A. 5). These decisions are necessary applications of the general principle reaffirmed by this Court that the Anti-Injunction Act is designed to "protect * * * the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference * * *." *Bob Jones University* v. *Simon*, 416 U.S. 725, 736.

Here, petitioner concedes (Pet. 11) that he has not satisfied the two-fold exception to the Section 7421 prohibition—that he demonstrate (1) that the government has no chance of prevailing on the merits of its tax claims, and (2) that absent injunctive relief he will suffer irreparable injury for which no adequate legal remedy is available. See *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 737; *Enochs* v. *Williams Packing Co.*, 370 U.S. 1. Under these circumstances, the district court had no jurisdiction to enjoin the Internal Revenue Service's investigation of his tax liability.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

JANUARY 1977.